

Section 73.3518 is designed to 'prevent abuse of the Commission's processes by the filing of two or more applications which are inconsistent with each other.'

2 F.C.C. Rcd. at 3494 (quoting WSTV, Inc., 17 F.C.C. 530, 531 (1953) (emphasis in Big Wyoming). As in Big Wyoming, the occurrence of a post-filing event--here the grant of the one

~~immediately following the filing of the application while the other~~

~~_____~~

on a race as to whether the violative application is processed before the violation can be caught could not meet any rational basis test.

It would be particularly arbitrary and capricious to excuse Four Jacks' violative filing based on the fact that its principals' renewal application happened to be processed promptly. It is incontestable that broadcast renewal applications, irrespective of their merits, can take years to process and can require the expenditure of immense Commission resources.

Finally, applying or not applying the rule based on the length of time one inconsistent application remains pending would actually encourage rule violations. If an applicant is permitted to "roll the dice" that one of its inconsistent applications might be resolved before the FCC could focus on the inconsistency issue, there is no deterrent against applicants pursuing the opportunity despite the rule's plain bar to such filings. This would obviously be inconsistent with the rule's purpose of conserving Commission resources.

- E. The staff order's effort to claim the mantle of "fairness" sets up a "straw man" as the allegedly necessary alternative to its decision. In fact, the Commission itself has repeatedly set out the exclusive and non-draconian procedure by which an applicant in the Smiths' position may appropriately seek both renewal of its current authorization and pursue an authorization to operate on a preferred channel in the same service and in the same community.

The VSD remarkably cites as a basis for its decision the unfairness that would result if "the principals of Four Jacks [were required] to give up all interests in WBFF(TV) merely in order to

compete for a Channel 2 facility." HDO at ¶ 3. This is a gross misrepresentation of Scripps Howard's position. Scripps Howard never suggested that such a draconian result would be necessary in order for the principals of Four Jacks to apply for Channel 2.

Scripps Howard consistently stated that applicants such as Four Jacks' principals, who have an existing station in the community, may seek authority to operate on a preferred channel in the same community without risking violating the inconsistent application rule (and certainly without divesting their existing station in advance). They must do so, however, by seeking the modification of their existing facilities, not by filing an inconsistent application for new facilities. Nothing is unfair about this policy. In fact, the Commission has followed it consistently, and Scripps Howard is unaware that the Commission has ever permitted an applicant to follow the course Four Jacks has set and that the HDO would permit.

Obviously, the "unfair" result sought to be avoided by the staff by its decision need not have occurred. The Smiths could have filed their mutually exclusive application for Channel 2 as a proposed modification of their own Chesapeake's Channel 45 license. Then, by Commission precedent, the inconsistent application rule would not apply. See Wabash Valley Broadcasting Corp., 18 Rad. Reg. at 568.

Of course, since the Smiths voluntarily chose to file their application for Channel 2 under a separate corporate entity from Chesapeake, the Commission cannot--as it elected to do in Atlantic

Broadcasting Co., see 8 Rad. Reg. 2d (P&F) 967, 968 n.1, and Wabash Valley--unilaterally assist the Smiths by treating the Four Jacks application for new facilities as one to modify the Channel 45 license. Still, no unfairness occurs. The Smiths have simply outsmarted themselves in their quest for the potential private gain they hoped to achieve from the improper sale of the abandoned Channel 45 authorization in the event they should supplant Scripps Howard on Channel 2. (See discussion below.)

The Smiths are experienced multiple owner broadcasters with experienced Commission counsel. Four Jacks' president, David D. Smith, has personally received Commission "guidance" with respect to the applicability of the inconsistent application rule. See Comark Television, 51 Rad. Reg. 2d at 741. The Smiths voluntarily chose to file their application through a separate corporate body, and this fact prohibits the post-filing corrective action that the Commission has chosen to apply on its own in the past. The Smiths must take the consequences of their voluntary actions, and that is the dismissal of their Four Jacks application.

- F. The staff's order erred in departing from Commission policy that parties should not be permitted to achieve private gain from the improper utilization of the public's resources.

The Commission in Southern Keswick made clear that its policy is to prevent an applicant from "select[ing] its own successor to a frequency in which it can have no further interest, while at the same time continuing to operate on another frequency in the same area." Southern Keswick at 626. The Commission recently followed a similar path by rejecting broadcaster arguments that broadcasters

should be permitted to sell their existing NTSC authorizations to help finance their relocation to the newly authorized advanced television channels. See Second Report and Order/Further Notice of Proposed Rulemaking re Advanced Television, FCC 92-174, ¶ 11 (released May 8, 1992).⁶

This is essentially the situation the Smiths propose to enjoy if they succeed in attaining Channel 2. While there are factual distinctions between the cases which might conceivably warrant a different result for the Smiths on the limited question of whether they really intend to create a new facility as opposed to modifying their license, the HDO's analysis does not attempt to address these matters because it holds erroneously that there is no policy against profiting from such changes. Certainly, the mere creation of a separate shell corporate applicant is insufficient as a matter of law. The HDO's decision thus would depart from the sound policy followed by the Commission in Southern Keswick by permitting the Smiths to pursue a Commission-disapproved course without considering the adverse effects of this course. See discussion below.

- G. The policy implications of the staff's policy change are novel and adverse for the Commission and the public.

Following the staff's policy course would require the Commission to risk expending very substantial or even immense

⁶ This proposal at least offered a public policy justification. As discussed below, under the HDO's policy, the public would gain no benefit from the change in policy, and the main purpose of the Commission's comparative renewal process would be undermined.

resources to process a renewal application while the applicants' true intent may be only to select its successor and collect the windfall gain from the sale of its frequency while continuing its operations on a channel provided for free by the public through the comparative renewal process. While arguably the prompt grant of the Chesapeake renewal application occurred without too much expenditure of resources, as discussed above, this new policy will necessarily apply in the future. Such encouragement for licensee adventurism with the comparative hearing process risks the waste of scarce public resources.

Further, this improper encouragement of challenges that would not be brought solely on public interest-based grounds would prejudice Scripps Howard and other incumbent applicants and may harm the Commission substantially in the future. In sum, the staff's new policy improperly encourages Four Jacks--and other licensees--to pursue the prosecution of a comparative renewal hearing against competitors in their markets solely in hope of immense private gain from the sale of their current authorizations should they succeed in wresting the desired channel from the incumbent.

The Commission must consider what the public may gain and what it may lose from this change of policy. Under one easily pictured scenario, since the inconsistent application rule would no longer discourage such actions by precluding any improper private gain from the practice, any licensee in a market might choose to challenge any other licensee's renewal. Thus, a current VHF

licensee could pursue authorization to construct a new facility on another occupied VHF channel with the same, or even a smaller, predicted coverage area. The comparative hearing process would then be being used to select among two incumbent licensees already offering comparable technical service to the community, and, assuming the challenged incumbent was qualified, there would be no necessary net benefit to the public from the expenditure of these public resources.⁷ On the other hand, the potential benefit to the challenger--sale of its abandoned authorization--is obvious.

Finally, adoption of the staff's new policy would open a new risk of significant negative impact on the operation of market forces in the affected market. Assuming the challenger should succeed, the selection of the only new licensee to serve the market would lie exclusively in the hands of that new licensee's direct competitor.⁸ The economic incentive for the successful challenger to obtain the highest price for its abandoned facility would be tempered by the economic benefit that would accrue from selecting a poor competitor who is minimally qualified.

Because the Commission relies on the proper operation of market forces to promote the presentation of programming that serves the public interest, see, e.g., Deregulation of Television,

⁷ The role of the comparative hearing process as a spur to incumbent performance would not be significantly diminished by the lessened encouragement of the limited class of persons operating stations in the market imposed by the continued application of the inconsistent application rule.

⁸ Section 310(d) of the Communications Act, 47 U.S.C. § 310(d), of course, precludes the Commission from considering anything but the proposed assignee's basic qualifications.

98 F.C.C.2d 1077 (1984), this policy change would subvert the policy underlying the comparative hearing process. The resource-intensive comparative hearing process is justified by its goal of selecting the best qualified applicants to be broadcast licensees. Under the staff's policy, the comparative hearing process could be invoked to supplant a qualified licensee who was selected either by the comparative process or by the operation of undistorted market forces, and this would occur in order to effect a possibly negative result. The community would be served by a new licensee who is hand-picked by its competitor, and possibly picked for economic reasons that would contradict the Commission's reliance on strong competition among licensees to promote the public interest.

IV. Conclusion and Requested Relief

As a final matter, the Commission does not need Scripps Howard to expound upon the agency's current staffing crisis. The inconsistent application rule is a bedrock of the agency's effort to control the unnecessary expenditure of scarce Commission resources, and its continued strict applicability has been affirmed repeatedly in recent decisions. See, e.g., T.C. Monte, Inc., 7 F.C.C. Rcd. 7572 (1992) (confirming that the excusing of inconsistent multiple ownership proposals with divestiture promises occurred only "so long as the principal common to both entities held less than a controlling interest in either"); Treasure Coast Media, 7 F.C.C. Rcd. 5533 (1992).

No application process consumes more Commission resources than a comparative renewal hearing. The inconsistent application rule thus should certainly be applied here as it was intended and as it has been applied consistently in the past. Such application of the rule will prevent both an abuse of the Commission's processes and the improper and unnecessary expenditure of substantial Commission resources at a particularly critical juncture in the history of broadcasting and of this Commission.

In sum, the HDO ignored the fact that the plain language of the inconsistent application rule is the appropriate guide to the Commission's intent, ignored Commission precedent that is directly on point that the rule applies here, and relied on principles that the Commission has held are not applicable to assessing the effect of violations of the inconsistent application rule. The HDO also erroneously relies upon its a "straw man" allegation about an "unfair" result that would result from applying the rule. That such a result would be required is demonstrably false, and that was never urged by Scripps Howard. It is the HDO which departs from the fair and public interest-serving policy course which the Commission has repeatedly said applies to this type situation. Finally, departure from the established policy would disserve the purposes of the comparative hearing process.

Accordingly, Scripps Howard requests (1) that that part of the HDO denying Scripps Howard's Petition to Dismiss be rescinded, (2) that Four Jacks' application be dismissed, and (3) that Scripps

Howard's renewal application be granted in accord with the HDO's finding that it is fully qualified for renewal.

Respectfully submitted,

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HEARING DESIGNATION ORDER

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-94

In re Applications of

Scripps Howard File No. BRCT-910603KX
Broadcasting Company

For Renewal of License of
Station WMAR-TV,
Baltimore, Maryland

and

Four Jacks File No. BPCT-910903KE
Broadcasting, Inc.

For a Construction Permit for
a New Television Facility on
Channel 2 at Baltimore, Maryland

HEARING DESIGNATION ORDER

Adopted: March 22, 1993; Released: April 1, 1993

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it: (1) the application for renewal of license of station WMAR-TV, Channel 2, Baltimore, Maryland, filed by Scripps Howard Broadcasting Company ("Scripps"), and the mutually-exclusive application of Four Jacks Broadcasting, Inc. ("Four Jacks") for a new commercial television station to operate on Channel 2, Baltimore, Maryland; (2) a petition to deny Four Jacks' application, filed by Scripps, and various responsive pleadings; (3) a petition to dismiss Four Jacks' application, filed by Scripps, and various responsive pleadings.¹

2. Four Jacks specifies a tower height of 381 meters. However, the record height for the specified tower is only 368.5 meters due to the removal of an antenna from the tower in 1987. Thus, it is not clear that the Federal Aviation Administration has approved the proposed tower increase to 381 meters and that the proposal would not constitute a hazard to air navigation. While these discrepancies do not render the application substantially in-

complete, an appropriate issue will be specified to determine whether the tower would constitute a hazard to air navigation.

3. In its Petition to Dismiss, Scripps alleges that the Four Jacks application should not have been accepted for filing because to do so would be a violation of Section 73.3518 of the Rules, which provides, "While an application is pending and undecided, no subsequent inconsistent or conflicting application may be filed by or on behalf of or for the benefit of the same applicant, successor or assignee." Chesapeake Television ("Chesapeake"), the licensee of Station WBFF(TV), Channel 45, (Baltimore, Maryland), is owned indirectly (through Sinclair Broadcast Group, Inc.) by the principals of Four Jacks. Chesapeake filed its license renewal on June 1, 1991. The application was granted September 26, 1991, and thus the renewal application was outstanding when the present application was filed on September 3, 1991. Scripps further alleges that grant of the present application would place the principals of Four Jacks in violation of Section 73.3555 of our Rules. We disagree that the inconsistent application rule precludes our consideration of Four Jacks' application. That rule was not intended to apply to circumstances such as those before us. In the application before us, the principals of Four Jacks have pledged to divest their interests in WBFF(TV) if Four Jacks is the successful applicant. Chesapeake's application for station WBFF(TV) has been granted. Clearly, it would be unfair to require the principals of Four Jacks to give up all interests in WBFF(TV) merely in order to compete for a channel 2 facility. The divestiture pledge removes any concern as to a violation of Section 73.3555 of our Rules. However, any grant of Four Jacks' application will be conditioned appropriately to require divestiture of all interests in WBFF(TV). The Petition to Dismiss will be denied.

4. Except as indicated by the issue specified below, the applicants are qualified to proceed as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to Four Jacks whether there is reasonable possibility that the tower height and location proposed would constitute a hazard to air navigation.
2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

¹ In its petition to deny, Scripps alleges: 1) that Four Jacks' application is substantially incomplete due to inconsistencies concerning Four Jacks' antenna; 2) that Four Jacks has failed to identify a safe transmitter site; 3) that Four Jacks will be incapable, because of its miscalculations of costs, of constructing

and operating the station; and 4) that Four Jacks may lack the requisite character to be a Commission licensee. To the extent that the pleading is a pre-designation petition to specify issues, it will be dismissed. *Processing of Contested Broadcasting Applications*, 72 FCC2d 202 (1979).

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

6. IT IS FURTHER ORDERED, That the Petition to Deny filed by Scripps IS DISMISSED, and the Petition to Dismiss IS DENIED.

7. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 1.

8. IT IS FURTHER ORDERED, That, in the event of the grant of Four Jacks' application for a construction permit for a television station to operate on channel 2 in Baltimore, Maryland, Four Jacks and its principals shall, upon commencement of operations on channel 2, certify to the Commission that they have severed all interest in and connection with television station WBFF(TV), Baltimore, Maryland.

9. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Video Services Division, Mass Media Bureau, Federal Communications Commission, Room 700, 1919 M Street, N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in that Rule, and shall advise the Commission of the publication of this notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Barbara Kreisman, Chief
Video Services Division
Mass Media Bureau

PETITION TO DISMISS

Stamp & Return

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

RECEIVED
MAY - 1 1992
Federal Communications Commission
Office of the Secretary

In re)
Application of Four Jacks)
Broadcasting, Inc.)
For a Construction Permit)
For a New Television)
Facility on Channel 2 in)
Baltimore, Maryland)

FCC File No. BPCT-910903KE

TO: The Chief, Mass Media Bureau

PETITION TO DISMISS

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Summary

The application of Four Jacks Broadcasting, Inc. ("Four Jacks") for authority to construct a new television station on Channel 2 in Baltimore was filed in violation of Section 73.3518 of the Commission's rules and must be dismissed. Section 73.3518 prohibits the filing of inconsistent applications, and Four Jacks' proposal was in conflict with the grant of another application then pending on behalf of the same principals: co-owned Chesapeake Television, Inc.'s ("Chesapeake") application for renewal of license for Station WBFF(TV), Baltimore, MD. Section 73.3555(a) of the rules barred the grant of Four Jacks' application while Chesapeake's renewal application was pending.

The Commission has previously addressed proposals similar to Four Jacks' and has consistently refused to process such applications for new facilities where, as here, an existing licensee proposed to build new facilities while pursuing a renewal application on behalf of its existing facilities in the same community. The Commission has instead required that licensees seeking to change frequencies do so exclusively through pursuing applications for modification of their existing facilities.

Commission precedent precludes relying on an assurance of divestiture to cure a violation of Section 73.3518. Therefore, Four Jacks' promise to come into eventual compliance with Section 73.3555(a) cannot cure the violation. The subsequent occurrence

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TO: The Chief, Mass Media Bureau

PETITION TO DISMISS

73.3555(a) which bars common ownership of two television stations in the same market, Four Jacks' application for new facilities on Channel 2 could not have been granted while Chesapeake's renewal application for Channel 45 was pending. See 47 C.F.R. § 73.3555(a).

Section 73.3518 of the Commission's rules prohibits the filing of such inconsistent applications either "by or on behalf of or for the benefit of" the same applicant.² Commission precedent interpreting this rule holds that while an applicant seeking renewal of a broadcast facility may, at the same time, seek authority to amend those facilities in order to specify a different and improved frequency for offering service to its community, an applicant cannot seek to construct new facilities while pursuing a renewal application for facilities on a different frequency in the same market. Atlantic Broadcasting Co., FCC 66-894, 8 Rad. Reg. 2d (P&F) 967, 968 n.1 (1966); Wabash Valley Broadcasting Corp., FCC 59-466, 18 Rad. Reg. (P&F) 559,

² Section 73.3518 provides:

While an application is pending and undecided, no subsequent inconsistent or conflicting application may be filed by or on behalf of or for the benefit of the same applicant, successor or assignee.

47 C.F.R. § 73.3518 (1991). This rule previously has been set out at Section 1.362, see WSTV, Inc., 8 Rad. Reg. (P&F) 854, 855 n.3 (1953); at Section 1.308, see Wabash Valley Broadcasting Corp., 18 Rad. Reg. 559, 566 n.3 (1959); and at Section 1.518, see Chapman Radio and Television Co., 20 Rad. Reg. 2d 1144, 1148 n.9 (Rev. Bd. 1971). The text has remained substantially unchanged.

568 (1959). See also Southern Keswick, Inc., 34 F.C.C.2d 624, 625-626 (1972) (explaining Wabash Valley's precedential effect).

Because the filing of Four Jacks' application for facilities violated Section 73.3518 of the rules, the application is "defective" as that term is defined in Section 73.3566(a).³ No request for waiver accompanied the application, and therefore, in accord with Section 73.3566(a), Four Jacks' application was improperly accepted for filing and must now be dismissed. See Big Wyoming Broadcasting Corp., 2 F.C.C.R. 3493, 3494 (1987) (dismissing a last-filed application on basis of violation of Section 73.3518).

The acceptance and processing of Four Jacks' application also would set an extraordinarily bad precedent that would open the door to abuse of the Commission's processes by persons pursuing solely private interests while heavily burdening already strained Commission resources. Four Jacks has structured its

³ Section 73.3566(a) provides:

(a) Applications which are determined to be patently not in accordance with the FCC rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will be considered defective and will not be accepted for filing or if inadvertently accepted for filing will be dismissed. Requests for waiver shall show the nature of the waiver or exception desired and shall set forth the reasons in support thereof.

47 C.F.R. § 73.3566(a) (1991).

application so that if it should be successful in supplanting Scripps Howard as the licensee of Channel 2 in Baltimore, it would then be able to sell its authorization for Channel 45 for many millions of dollars. The Commission's established policy of requiring existing licensees to seek new facilities in the same market by the vehicle of amending their existing authorizations prevents such windfall profits by leaving the successful

Section 73.3555(a)) precludes the grant of an application for a new facility to serve the same community where an application for renewal of license filed by the same parties is pending. See Atlantic Broadcasting Co., 8 Rad. Reg. 2d at 968 n.1.⁴

The Commission does not preclude existing licensees from pursuing efforts to upgrade their facilities by operating on a superior channel. It has consistently found that an application to amend the licensee's existing license to specify a different channel--not an application for a new station--is the means that is consistent with seeking renewal of the currently occupied channel's license. See Atlantic Broadcasting Co., 8 Rad. Reg. 2d at 969; Wabash Valley Broadcasting Corp., 18 Rad. Reg. at 568. See also Chapman Radio and Television Co., 20 Rad. Reg. 2d 1144, 1150 (Rev. Bd. 1971).

In Atlantic and Wabash Valley, the applicants in fact attempted to pursue applications for new facilities, but the Commission recognized that these attempts were impermissible because they were inconsistent with the parties' efforts to retain their existing facilities. See Atlantic Broadcasting Co., 8 Rad. Reg. 2d at 968 n.1; Southern Keswick, Inc. 34 F.C.C.2d 624, 625 (1972) (discussing Wabash Valley). The Commission was able to treat the applicants' proposals as

⁴ As noted in the text of that decision, Atlantic's application for renewal of its existing facilities (Station WUST) was then pending in hearing. 8 Rad. Reg. 2d at 968. The language of n.1 indicates further that the Commission would bar

applications for a change in their existing stations' facilities so that the applications could be processed. Id.⁵ Such treatment is not possible for the Four Jacks application because the Chesapeake principals did not file an application that can be deemed an "upgrade." They created a wholly separate corporate entity, Four Jacks, to pursue the Channel 2 authorization, and the Commission cannot deem Four Jacks to be pursuing an amendment of Chesapeake's licensed Channel 45 facilities because, inter alia, by FCC rule Four Jacks can exert no control over FCC-licensee Chesapeake.

In Southern Keswick, Inc., 34 F.C.C.2d 624 (1972), the Commission elaborated further on its concern that licensees who are in reality seeking to obtain modified facilities must do so in the context of improving their existing facilities rather than by filing an application for new facilities that is inconsistent with a pending application. In that case, Southern Keswick sought a construction permit to build a new noncommercial FM radio station on a different frequency from its existing FM station and at the same time filed a contingent application to sell the existing FM facilities. Id. The Commission dismissed both of Southern Keswick's applications for violating Section 73.3518 (then Section 1.518). Id. The Commission cited Atlantic and Wabash Valley to support its finding that while Southern

⁵ Atlantic's application to change frequencies nevertheless had to be returned due to its inconsistency with yet another application that was pending on behalf of the applicant. See 8 Rad. Reg. 2d at 968-69.

Keswick's construction permit application purported to be for a new facility, it was in reality an application to amend the current license to specify a different frequency. Southern Keswick, 34 F.C.C.2d at 627. In one respect, this case is distinguished from the present Four Jacks situation principally by the fact that Southern Keswick expressly disclosed from the start its plan to extract private gain from the structure of its proposal. See discussion infra at Section III.

The plain language of the rule and these three cases, Wabash Valley, Atlantic, and Southern Keswick, demonstrate conclusively that Four Jacks' application for new facilities is subject to the prohibition of Section 73.3518.

II. Four Jacks' promise to come into eventual compliance with the multiple ownership rule cannot cure the Section 73.3518 violation, and dismissal of the last-filed application is the required remedy.

Four Jacks' application indicates at Exhibit 4 that its principals will come into compliance with the multiple ownership rule in the event its application for Channel 2 is granted. The Commission has held repeatedly, however, that such an assurance of eventual compliance cannot mitigate a violation of Section 73.3518, where, as here, the pertinent party holds a majority interest in the inconsistent applications. WSTV, Inc., 9 Rad. Reg. (P&F) 175, 178 n.6 (1953); Big Wyoming Broadcasting Corp., 2 F.C.C.R. at 3494.

Interestingly, Four Jacks' principals should be quite aware of the Commission's policy with respect to the inadequacy of a divestiture proposal in this situation because of a case

involving David D. Smith--a major principal of both Four Jacks and Chesapeake. In Comark Television Inc., 51 Rad. Reg. 2d (P&F) 738 (1982), the Commission approved the processing of numerous applications for new FM facilities in which Mr. Smith held minority interests even though Mr. Smith had interests in so many applications that not all of them could be granted under the national multiple ownership rule limits. The Commission held that because Mr. Smith could easily divest some of these minority interests if necessary and thus bring the applications into compliance with the rules so as to avoid the possibility that some would necessarily be dismissed, the processing of all the applications could continue. Id. at 741. Crucially, however, the Commission expressly relied upon its finding that the filing of all these applications did not violate Section 73.3518 of the rules because the applications in which Mr. Smith held minority interests "were not filed 'by or on behalf of or for the benefit of the same applicant' as provided in [Section 73.3518]." Id. Here, of course, the common control of Four Jacks and Chesapeake by David D. Smith and his brothers does require the application of Section 73.3518, and the Commission's reasoning in Comark expressly requires immediate dismissal here.

It is settled that in addressing a violation of Section 73.3518, dismissal of the last filed inconsistent application is the required remedy. In Big Wyoming Broadcasting Corp., the Commission clarified that when "a majority interest in [two] applicants is held by the same person or entity, resulting in a